THE INCOME TAX.

IS THE TAX CONSTITUTIONAL?

MR. BARTLETT'S ARGUMENT.

The constitution of the United States (article 1, section 2) provides that "Representatives and direct taxes shall be apportioned among the several States which may be included within the Union according to their respective numbers." This is plain. Its meaning is unmistakable. According to the established rules of legal interpretation it forbids, by necessary implication, the levying of any direct tax not so apportioned. But the framers of the constitution were particularly jealous of the exercise of the power of direct taxation by the general government. They saw fit to surround it with extraordinary safeguards. They did not trust the prohibition to lay direct taxes, save in the manner specified, to mere inference, however clear the implication might seem to be. In the ninth section of the same article they state this prohibition in terms as follows:—"No capitation or other direct tax shall be laid unless in proportion to the enumeration hereinbefore directed to be taken." The income tax is not so apportioned. Is it a direct tax? If it is a direct tax, not being so apportioned, it must be unconstitutional.

An income tax is not of so recent origin that there has not been sufficient time and opportunity for its nature and character and the description of tax to which it belongs to become fully understood. We have but to open the book of history to study it in the light of centuries. More than a thousand years ago it was one of the chief causes of the destruction of the mightiest Power on earth. The Roman empire fell under the oppressive weight of direct taxes, and of all those taxes a capitation tax, proportioned to revenue or income, seems to have been the most abhorred and the most dreaded. (Hume's "Essays," i. 355, 356; "Gibbon's Decline and Fall of the Roman Empire," vol. ii. 149, 150; Zosimus, i. ii. p. 115.)

Rulers in former times clung to this species of tax as a convenient, serviceable instrument of tyranny. Gradually, as nations gained their freedom, they shook it off. It may well retire before the march of civilization, for everywhere it is the prolific mother of fraud and perjury, and the dutiful handmaid of the father of lies. Prying, inquisitorial, impudent, offensive, odious in its nature, it consorts not with liberty. An official investigation into the operation of the income tax in England discovered an extent of fraud attending its collection which shocked the religious sense of the country. It had developed an elasticity of conscience far exceeding the proverbial latitude of custom house oaths. A few made scrupulously correct returns, under the law, but the great majority exhibited a degree of modesty in stating their incomes which would have been more becoming in a self-made estimate of their virtues; while many an insolvent debtor sought to bolster up his tottering credit by swearing to an exaggerated representation of the profits of his business. The law had worked as if it were a special device of Satan—a broad and easy road, leading both ways into temptation.

A TAX ON HONESTY.

McCulloch—not our Secretary of the Treasury, but the distinguished English writer on political economy—remarks:—

> Most persons have the greatest dislike to the payment of direct taxes; and though occasionally a few individuals may be found who, either from a wish to be thought richer than they really are or under the suspicions of their creditors, return their incomes beyond their real amount, the vast majority endeavor to conceal and underrate them. * * * And it is next to impossible to defeat the machinations of such persons by instituting an examination into the state of their affairs. In very many cases such an examination can lead to no satisfactory result. The commissioners employed to assess the tax must either accept the returns sent by those parties whose revenues are not derived from visible and easily appreciated sources when verified by their oath, or they must be authorized to assess them according to their own notion of what is right and proper. If the former criterion is adopted, everything is made to depend on the honor of the parties, so that the tax will be made to fall with its full weight upon men of integrity, while the millionnaire of easy virtue may well nigh escape it altogether. Hence it may truly be said to be a tax on honesty and a bounty on perjury and fraud. * * * Taxes on property certainly have been held, and are held, by statesmen and lawyers to be direct taxes. We shall now see that no valid and legal distinction can be made between a tax on land and a tax on the income of the same land, or between a general assessment upon property and a tax upon the income of the same property; and in considering this principle I come to the solid immovable rock on which I ground my whole argument—that is, to the adjudication of the tribunal of last resort for such questions in this country, the Supreme Court of the United States. These settle the whole matter beyond a doubt and place it out of the reach of cavil.

DECISIONS OF THE SUPREME COURT.

In an early case (1796) the court laid down the doctrine that a tax on land is a direct tax in the following emphatic terms:—"Both in theory and practice a tax on land is a direct tax." (Hylton vs. the United States, 3 Dallas, 171.)

Now, it will appear by other decisions of this court, and of other courts, that a tax on the income of land is in effect, and in law, the same thing as a tax on the land itself; and as the income tax is a tax on the income of land as well as the income of other property, it is in legal intendment and construction a tax on land, as well as on other property; a tax on land—a direct tax—and, being unapportioned according to the census, it is consequently unconstitutional and void.

It has long been well settled that "a devise of the income of land is in effect the same as a devise of the land itself." (9 Mass., 572; 1 Ashmead, 136.) So in the State of New York the same doctrine is held. (11 Wendell, 298; 17 Wendell, 402.) A devise of the rents and profits of land or the income of land is equivalent to a devise of the land itself. (Washburn on Real Property, 2, 752, and cases there cited.) And the rule which has uniformly governed the Supreme Court of the United States is that where any principle of law establishing a rule of real property has been settled in the State courts the same rule will be applied by that court that would be applied by the State tribunals. (Jackson vs. Chew, 12 Wheaton, 153.) Thus it is the doctrine of the Supreme Court of the United States, as well as of the State courts, that a devise of the income of land is the same thing as a devise of the land. And the court has decided in several cases that in levying taxes, as well as in the devise of land, the substance, and not the form must govern, and have pronounced illegal the various attempts which have from time to time been made to lay some prohibited tax by the mere evasion of the express words of the prohibition.

There is certainly more plausible ground for contending that there is a difference in principle between a tax on a bill of lading and a tax on the article shipped than for a distinction between a tax on the value of land and a tax on the income of land. Yet in the case of Almy vs. the State of California, (24 Howard, 174), the Supreme Court of the United States held that a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is, in substance, the same thing; and that a law prohibiting a tax on the article shipped by necessary implication prohibits a tax on the bill of lading of the same article.

The State of Maryland undertook to levy a tax on the occupation of an importer, by requiring him to pay for a license to carry on his business; but Chief Justice Marshall decided that this was a tax on imports, and, being laid by a State, was unconstitutional and void. (Brown vs. Maryland, 12 Wheaton, 439.)

In another case the Supreme Court of the United States decided the exact question at issue here, whether a tax on the income of a thing is the same as a tax on the thing itself, and held that a tax which could not be legally levied on an office could not be legally levied on the income of the same office: from which it irresistibly follows that if an unapportioned tax cannot constitutionally be laid upon land, it cannot constitutionally be laid upon the income of land. This was the case of Dobbins vs. the Commissioners of Erie County, in which the court decided that the emoluments of an office could not be taxed if the office was exempt. (16 Peters, 435.) If the decisions of the courts—of the highest State tribunals and of the Supreme Court of the United States—are to stand, if a devise of the income of land is a devise of the land itself, if a tax on the income of an office is in effect the same as a tax on the office, then the income tax, being a tax on the income of property in general, is, in legal principle, the same thing as a general assessment on property; and being a tax upon the income of land, as well as of other property, is, in effect, a tax on land. It is a direct tax, and not being apportioned to the census, as the constitution requires that all direct taxes must be apportioned, it is laid without the authority of the constitution and against the authority of the constitution, and, as has been decided by Chief Justice Marshall, "an act repugnant to the constitution cannot become the law of the land." (Marbury vs. Madison, 1 Cranch, 137.)

The statute law of the United States, as well as the decisions of the courts, recognize real estate and the income of real estate to be the same thing. It accounts a succession to the income to be a succession to the estate. This is done by the very act which imposes the income tax. Section 127 of that act lays a tax on the succession to real estate; and it defines a succession to real estate to be every disposition of real estate by reason whereof any person shall become beneficially entitled "to any real estate or the *income* thereof."

CONSEQUENCES OF A DIFFERENT DOCTRINE.

The case might be safely rested here on the decision of the courts; but the matter is of such grave importance that it is worth while to pursue it somewhat further and to consider what would be the consequences of a different and opposite doctrine. The States have generally assessed their taxes upon real and personal property and have considered this direct taxation. (See Report of Oliver Wolcott, Jr., Secretary of the Treasury, to Congress, on Direct Taxes, 1796.) George Nicholas, in the Virginia Convention in 1788, speaking of the State systems of taxation, said:—"The public treasuries are supplied by means of direct taxes." (3 Elliot, 99.) The leading statesmen of a later date have regarded a general assessment on property—the prevailing mode of levying taxes in the States—as direct taxation. "The States have scanty resources without resort to heavy direct taxes." (Webster in the Hayne debate.)

I have already, I trust, established the point, by reference to judicial decisions, that if a general assessment on property is a direct tax, the income tax, on the income of property in general, is not less a direct tax. To controvert either branch of this proposition both must be controverted. Let us examine in what predicament a reversal of the doctrine that a general assessment on property is direct taxation would leave the State of New York. The most important financial legislation of this State is based upon that principle. Our State constitution (article 7, sections 10-12) provides that no debts—with certain exceptions therein specified—exceeding in amount $1,000,000 shall be contracted, unless in the law authorizing the same provision be made for the payment of the interest and of the principal within eighteen years by an annual direct tax. The State has uniformly construed the requirement for a direct tax to be fulfilled by a general assessment. If a general assessment be not a direct tax the practice of the State of New York in this particular has been, and continues to be, wholly erroneous and unconstitutional. The State raised twenty-seven millions of bounty money. It has no constitutional authority to raise money to pay the debt thus incurred except by a direct tax. The only provision made for raising the money to pay it is by general assessment. If the general assessment be not a direct tax every step which the tax gatherer takes towards collecting that twenty-seven millions of bounty money—either the principal or the interest—he trampies upon the constitution of the State. According to well settled principles there can be no distinction between a general assessment on property and a tax on the income of the same property. It follows that either the general assessment for the payment of the twenty-seven millions of bounty money is not a direct tax, and is consequently a violation of the constitution of the State of New York, or the income tax is a direct tax, and, being unapportioned, is consequently a violation of the constitution of the United States. If one is a direct tax both are direct taxes; and one or the other must inevitably be unauthorized. If the income tax is to be maintained the legislation of the State of New York for paying the bounty loan cannot be amended too soon. The one is repugnant to the constitution of the State, or the other is repugnant to the constitution of the United States. From this conclusion there is no escape. The only ground on which the unapportioned income tax can be held to be constitutional is that a tax which would not be legal if laid on property may legally be laid on the income of the same property. Let us see with what mischief this principle would be fraught if introduced into State legislation. If it is sound and valid, as applied to the laws of the nation, it is equally sound and valid as applied to the laws of the States. Let us consider to what its adoption would lead. The States are prohibited from laying imposts or duties on imports or exports, except what may be "absolutely necessary" for executing their inspection laws. (Cons. U. S., art. 1, sec. 10.)

IT WOULD OVERTHROW THE GENERAL GOVERNMENT.

If the doctrine on which the income tax is founded is correct; if the United States, being prohibited from laying an unapportioned tax on land, can lay it on the income of land, then, by parity of reasoning, the States, which are prohibited from taxing imports and exports, may lay a tax of any amount on all incomes derived from imports and exports. The importance, the necessity of guarding against such subtle distinctions, existing only in form, in the exercise of the power of taxation, was apparent to Chief Justice Marshall, when the subject first came judicially before him. To his comprehensive, sagacious, far-seeing mind it was clear that the very existence of the general government depended upon overruling these unsubstantial, technical destinctions. In speaking of the attempt to evade the prohibition to States of the right to tax imports, by nominally taxing the occupation of an importer, he said:—"It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to the particular mode of doing the forbidden thing." (12 Wheaton, 439.) And in the same case he said:—"All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself." A very interesting attempt to lay an unconstitutional tax by evasion was made by the State of Maryland. The United States Bank, by authority of its charter, derived from the general government, established a branch bank in Maryland. Of course the State could not tax this branch; otherwise it might tax it out of existence, and destroy, or seriously impair, within its own limits, the power of the general government to borrow money. The State tried to evade the prohibition by imposing the tax on the bills of the branch bank. The Supreme Court decided that the tax on the bills was substantially the same thing as a tax on the bank. Chief Justice Marshall, with characteristic penetration, perceived that the question involved a principle vital to the nation. He said:—

> If we apply the principle for which the State of Maryland contends to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government and of prostrating it at the feet of the States. The American people have declared their constitution and the laws made in pursuance thereof to be supreme; but this principle would transfer the supreme power, in fact, to the States. (Brown vs. Maryland, 12 Wheaton, 439.)

The State of Maryland could have carried out the principle for which it contended just as mischievously and just as destructively to the national credit and the national power by taxing the income as by taxing the bills of the bank; and if the income tax is constitutional this could have been done.

THE INCOME TAX THE FIRST FORM OF NULLIFICATION.

Not only have other and similar shallow distinctions been tried in the name and style of levying a tax for the purpose of evading the law, but the precise one adopted by Congress in laying the income tax is not new. It was the form which nullification first assumed in the city of Charleston—in embryo. If the principle of the income tax had been acquiesced in by the Supreme Court at that time there would have been no occasion even for States that wished a separation to resort to rebellion. They could have expelled the United States government from their territory without ever firing a gun. And if the principle which was rejected there is to be adopted now the blood and treasure expended in the war have been spent for naught. We have a judicial decision of the question as it arose at that time. It came up in this way:—The City Council of Charleston, by authority of its charter, derived from the State of South Carolina, passed an ordinance which is thus described by Judge Johnson, of the Supreme Court:—"It is true the act of the city of Charleston which imposes this tax is most clumsily worded. But I think it clear that, taken together, the object is to impose an income tax." And thus by his associate on the bench, Judge Thompson:—"It is a tax upon the net income of interest upon money secured by bonds, notes, insurance stock, six and seven per centum stock of the United States, or other obligations on which interest has been received. * * * it is, therefore, a general tax upon income of money at interest," &c. Chief Justice Marshall and a majority of the court held that this taxing of the net income of United States stock was simply one method "of taxing and opposing the power of the government to borrow money." The Supreme Court, in this case, decided that when a State was prohibited from laying a tax on United States stock it could not evade the prohibition by laying the tax on the income of the same and of other stocks. The same court have decided (3 D. 171) that the general government is prohibited from laying an unapportioned tax on land; and it would seem to follow that this prohibition cannot be evaded by laying the tax on the income of land and of other property, as is attempted by the present income tax.

IT WOULD MAKE STATES SUPREME.

If the United States could evade the decision of the Supreme Court by laying the tax on the income of land, which is prohibited if laid on land, then the States which are prohibited from taxing imports, and exports and United States securities and offices under the general government, might evade the prohibition by taxing the incomes of all these; and if they could tax them for their own use one per cent they could tax them one hundred per cent. Says Chief Justice Marshall, in the case already referred to (2 Peters, 449):—

> If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent, within the jurisdiction of the State or corporation which imposes it, which the will of each State and Corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods, for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend, may be burthened, impeded, if not arrested, by any of the organized parts of the confederacy.

And in another case Chief Justice Marshall says: "It is obvious that the same power which imposes a light duty can impose a very heavy one—one which amounts to a prohibition. * * If it is to be exercised at all, it must be exercised at the will of those in whose hands it is placed." (12 Wheaton, 436.) That "the power to tax involves the power to destroy," Judge Marshall places among "propositions not to be denied." (4 Wheaton, 316.) So says Daniel Webster:—"A power of taxation, without fixed limits, and without guards, is a power to embarrass, a power to oppress, a power to expel, a power to destroy."

STATES COULD EXPEL THE GENERAL GOVERNMENT.

Grant to the States the right to tax United States securities by imposing a tax of one hundred per cent on the income derived from them—and if the income tax is constitutional they have it—and what would such securities be worth in any rebellious State? Just as much as the bonds of the Southern Confederacy are worth to-day, and no more. Chief Justice Marshall, speaking of the proposed tax on the income of United States stock, said:—"It is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely." (2 P. 449.) Officers of customs are patriotic; but it is the oil of fat salaries which keeps the flame of their patriotism burning and bright. Let a State levy a tax of one hundred per cent on the income of these officers, and would there be such a strife as there now is for the privilege of serving the government? Is it not plain that if you establish a distinction between the right to tax a thing and the right to tax its income—a distinction without which the income tax is void—you place the credit and the power of the general government at the mercy of the separate States? Any disaffected State, by a system of taxation upon the incomes derived from offices under the general government within its own limits, upon incomes derived from imports and from exports, amounting, if need be, to the sum total of such incomes, could virtually expel the general government from its territory, and substantially accomplish all the injury which would attend its formal withdrawal from the Union. South Carolina, in the time of nullification, wished to throw open the port of Charleston to the free importation of goods. She wanted to escape the tariff, but knowing that she did not possess sufficient military and naval force to keep the port of Charleston open she prudently desisted. If the distinction between taxing a thing and taxing its income, now attempted by Congress in the income tax, is law, how easily, by a tax of one hundred per cent on the incomes of all United States officers, could she have banished these troublesome representatives of the general government from her borders, and the very odor of the tariff with them. Or suppose she had said, if she could not have goods free, she would not have them at all. In addition to the tax upon the incomes of offices, she would only have had to impose a tax of one hundred per cent on all incomes derived from imports and all incomes derived from exports to establish the most complete blockade imaginable. Erect the principle which underlies the unapportioned income tax, without which it cannot be maintained, and any disaffected State can paralyze the authority of the general government within the limits of its own jurisdiction. And what disaffected States would do, if they could match the will with the power, is it not written on the battle fields of the rebellion? The brain of Calhoun, racked upon the subject for a quarter of a century, was impotent to invent any doctrine so fatal to the existence of the government. The Union which the sword could not divide, which a million of fighting men could not tear asunder, will be seen, by the inexorable logic of such a law, without the aid of sabre or cannon, of cavalry or infantry, silently but certainly to fall to pieces. If this is constitutional law Jefferson Davis may linger in his prison or roam abroad on his bail bond, but his cause will have triumphed. He will have found in the author of the income tax an unconscious but a more successful ally than he had in Robert E. Lee. State sovereignty over the national power will be fully established, not, it is true, temporarily by rebel cannon, but permanently by republican legislation. On the whole, considering by whom the income tax is principally paid, and that to maintain its constitutionality we must practically concede the whole doctrine for which the rebellion was waged, it seems to me, as a political and party measure, equal in brilliancy to an appropriation of loyal money by a loyal Congress for the support of the rebel armies.

ERRONEOUS NOTIONS OF THE ORIGIN OF THIS PROVISION.

It has been contended that the provision of the constitution, that direct taxes shall be apportioned to population, grew out of the institution of slavery, and that the reason of the law having ceased the law should cease also. I know not whence those who advance this opinion derive their information. *The apportionment of taxation to numbers existed under the old confederation, when the representation of the States was equal*—that is, when one State was allowed just as many members of Congress as another, every State being entitled to seven. It was adopted in an amendment to the original articles of confederation; and the committee, consisting of Mr. Madison, Mr. Ellsworth and Mr. Hamilton, appointed by Congress to recommend it to the States, say in their address:—

> This rule, though not free from objections, is liable to fewer than any other that could be devised."

REASON OF THE RULE.

The same reason which led to the adoption of this rule under the old confederation caused its preservation in the constitution, which was that it was considered the most just and equitable rule for the apportionment of taxes that could be made. The debates in the Federal Convention show this. When the question of the best mode of apportioning taxes was under discussion Roger Sherman, of Connecticut, said he "thought the number of people alone the best rule for measuring wealth as well as representation." (Elliot's Debates, v. 297.) Mr. Gorham, of Massachusetts, supported the propriety of establishing numbers as the rule. He said that in Massachusetts estimates had been taken in the different towns, and that persons had been curious enough to compare these estimates with the respective numbers of people, and it had been found, even including Boston, that the most exact proportions prevailed between numbers and property." (Ibid, 300.) Mr. Wilson, a leading member from Pennsylvania, said:—"He had seen the western settlements of Pennsylvania, and on a comparison of them with the city of Philadelphia could discover little other difference than that property was more unequally divided here than there. Taking the same number in the aggregate in the two situations he believed there would be little difference in their wealth and ability to contribute to the public wants." (Ibid, 301.) Dr. Johnson, of Connecticut, "thought that wealth and population were the true, equitable rules of representation; but he conceived that these two principles resolved themselves into one, population being the best measure of wealth." (Ibid, 303.) And when the vote came to be taken in the Federal Convention on the proposition that direct taxation ought to be proportioned to representation, it passed without opposition. (Ibid, 302.) The attention of those who have supposed that this provision of the constitution was adopted wholly to promote the interests of slavery, is invited to the historical fact that when the first direct tax was under discussion in Congress, Southern members—conspicuous among whom were James Madison and George Nicholas, of Virginia—insisted with unyielding pertinacity that the tax should be laid on slaves as well as upon land.

PROPORTION OF DIRECT TAXES MUST BE EXACT.

The framers of the constitution intended that the apportionment of direct taxes among the States should be in more exact ratio to the population even than it is possible to apportion the representation. For example: suppose one representative to every ninety thousand inhabitants, a State might have a large fraction left over; but the apportionment of direct taxes was designed to be with mathematical accuracy to the precise number of persons ascertained by the census. After the first apportionment of representatives had been made in the federal convention, by estimated population, before an actual census, it was held that the estimate of the population of the different States was not sufficiently accurate for the apportionment of a direct tax; and that, consequently, the general government could not lay a direct tax until a census should have been taken. Elbridge Gerry, of Massachusetts, moved that until a census be taken direct taxation be apportioned to the number of representatives. Mr. Carroll, of Maryland, replied that *"the number of representatives did not admit of a proportion exact enough for a rule of taxation."* (Elliot's Debates, v., 451.) Mr. Ellsworth "thought such a rule unjust. There was a great difference between the numbers of inhabitants as a rule in this case. Even if the former were proportioned as nearly as possible to the latter it would be a very inaccurate rule. A State might have one representative only that had inhabitants enough for one and a half or more, if fractions could be applied." (Ibid., 453.) Mr. Gerry's motion was defeated. The convention, after debate, *decided that direct taxes must be apportioned in the States in more exact ratio to the population than the representation could possibly be apportioned.* (Elliot, v., 453.)

Many of the leading patriots of the Revolution—Patrick Henry among them—were distrustful of granting this power, even with the restriction placed upon its exercise. Massachusetts accompanied her adoption of the constitution with a resolution signed by John Hancock, whose name heads the list of signers of the Declaration of Independence, recommending an amendment of the constitution which should prohibit Congress from levying a direct tax until they should first have made a requisition on the States. (1 Elliot, 325.) The same amendment, word for word, was recommended by the State of New York and the State of North Carolina, and similar resolutions by South Carolina and Rhode Island and Virginia.

In the apportionment of the direct taxes which had been laid by Congress previous to the income tax the ratio to the census had been preserved with scrupulous accuracy. The actual use of the authority up to the time of the imposition of the income tax was in accordance with the understanding of the framers of the constitution. Thus we see with what nicety the direct tax of twenty millions, approved August 5, 1861, was apportioned. The ratio of New York is thus stated:—"To the State of New York, $2,603,918½."

INJUSTICE TO NEW YORK.

In 1850 the apportionment of representation was changed. The principles of a report on the subject, made several years previously in Congress by Daniel Webster, were adopted, and by their application the relative representation of New York in the United States House of Representatives was reduced, to make it more accurately proportioned to her population. Thus we perceive that,

1. The comparative representation of New York in Congress was reduced by the apportionment of 1850.

2. It will be greatly reduced by the increase about to take place in the representation of the Southern States.

3. That while our comparative representation is subjected to such reduction, the proportion of direct taxes levied upon the State has been more than doubled. In order to render this kind of legislation constitutional an amendment to the constitution would be required, to read as follows:—"Representatives and direct taxes shall be *disproportioned* to each other!" In the apportionment of the direct tax of 1798 the sum put down to the State of New York was one hundred eighty-one thousand six hundred eighty dollars seventy cents and seven mills; and in that of 1813 four hundred thirty thousand one hundred forty-one dollars and sixty-two cents. It will be seen that in laying all these direct taxes the requirements of the constitution were observed by apportioning them strictly according to the census, even to the fraction of a dollar.

THE ABOLITION OF SLAVERY NO REASON FOR CHANGING THE RULE.

The abolishment of slavery, so far from removing the reason for apportioning direct taxes to population, creates an additional cause why the Northern and Western States should insist on adhering to it. The former slaves, only three-fifths of whose number was reckoned in apportioning representation, are now counted in full, the same as other persons, and the former slave States will gain by this change a large increase of representatives. Their proportion of direct taxes should be increased correspondingly, unless it is proposed to give the colored man the ballot and at the same time exempt him from taxation; to make him not the equal of the white, but his superior; not merely "a man and a brother," but a man and a master.

REBEL STATES DO NOT PAY.

The unapportioned income tax is as unequal and unjust in its operation as it is unlawful in principle. Its burden rests almost entirely upon the loyal portion of the country, as if it were designed as a punishment for patriotism and a reward, by way of pecuniary exemption, for treason. The ten rebel states—Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, Arkansas and Texas—paid of the tax collected in 1866 less than one per cent of the whole amount of the income tax. The Eighth Congressional district of New York paid $5,350,751 49. Mississippi, the State of Jefferson Davis, paid, all told, the enormous sum of $60, no fractions. At this rate the payment of the national debt, by an unapportioned income tax, would be just about as easy, so far as the part of the rebel States is concerned, as repudiation. It is true that last year the rebel States did a little better; and, for my own part, I cannot severely blame them, because they do not contend, as for a prize, for the privilege of paying a tax, the principle of which was held to be unconstitutional when South Carolina put it to the test. And not until some new principle of human nature, never yet discovered, shall be evoked, will men manifest extreme alacrity to pay for being whipped. Heavy blows subjugate, but they can hardly be expected to quicken the conscience to a lively sense of pecuniary obligation for the expense of dealing them.

NEW YORK WRONGED OUT OF ELEVEN MILLION DOLLARS IN ONE YEAR.

The income tax paid by the Eighth Congressional district of New York in the year ending June 30, 1867, amounted to $5,405,676 04. The income tax paid by the State of New York, for the same year, was $20,085,507 71. This is more than double the amount that the State would have had to pay had the tax been apportioned to the census, as required by the constitution. By an unconstitutional law a sum amounting to over ELEVEN MILLIONS OF DOLLARS more than the just proportion was taken from the pockets of citizens of the State of New York in the year 1867. That was the third year of this measure of injustice. And yet, during all the years that it has been perpetrated, the State has remained dumb on the subject on the floor of Congress, voiceless in the Senate, and voiceless in the House of Representatives!

During the rebellion there was naturally a strong disposition to acquiesce in the measures of the government. This arose from noble and patriotic impulses. War has its own laws; but their sombre shadow should not be permitted to rest on the constitution in time of peace. The feeling of patriotism which sanctions unconstitutional legislation merely because it follows a patriotic war, is as blind as the sentiment of reverence when it leads to the worship of idols and to human sacrifice.

IT CONCERNS THE WHOLE PEOPLE.

This matter concerns the poor as well as the rich. If the rights of property can be invaded with impunity and in defiance of constitutional law, the freedom of the citizen will not long remain secure. Rights of property and rights of person are inseparable; they exist or perish together. A slave who does not own himself cannot own any property. And just in proportion as a government renders insecure the fruits of a man's labor, whereby he maintains his life and his independence, it reduces him towards the condition of a slave. Whenever the constitution fails to prove an impenetrable shield to all those rights of property over which it extends, it will cease forever to yield protection to liberty. In the constitution it is written as plainly as the Ten Commandments are written in the Bible, that no capitation or other direct tax shall be laid, unless in proportion to the census. The income tax is a direct tax, and is not laid in proportion to the census. It only remains for Congress to repeal the tax, or to apportion it according to the census. A disposition has been manifested, in quarters where statesmanship was to be expected, to speak slightingly of the constitution as a mere bit of parchment. Let it be borne in mind that, parchment though it be, it is the only foundation of our government. The simple adoption of this parchment constitution by the thirteen original States was the only act of formation of the present Union. The constitution breathed into this nation the breath of life. But for the authority derived from it we had no right, either legal or moral, to wage our recent war and to crush the rebellion. The constitution is the government. So believed Abraham Lincoln. When he had taken the Presidential oath to "preserve, protect and defend the constitution" he said, "I have the most solemn oath registered in heaven to preserve, protect and defend the government;" and so highly did the State of New York approve this interpretation of the oath that she caused it to be painted in large letters, stretching across the whole width of her Assembly Chamber above the portrait of Washington, that it might confront the sight of her representatives forever.

Remember, O Congress! while the President of the United States stands arraigned at the bar of the Senate, impeached by the House of Representatives for the violation of law, the corner stone of the constitution, pried away by an act of legislation, still remains out of place.

W. G. BARTLETT.

HOFFMAN HOUSE, New York, March, 1868.

APPENDIX.

Notes on the Carriage Case.

HYLTON VS. THE UNITED STATES, 3 DALLAS, 171.

It is undoubtedly to the loose dicta of the Judges in this case, to the effect that a capitation tax and a tax on land are the principal, if not the only, direct taxes within the meaning of the constitution, that the general acquiescence in the unapportioned income tax is in a great degree attributable. The case was as follows:—Hylton kept one hundred and twenty-five chariots; they were taxed by the United States, and the Supreme Court held that the tax was indirect, and did not require to be laid according to the rule of apportionment. The decision of the particular case before the court was probably correct. It is impossible that a man could have kept so many carriages for himself and his family only to ride in; and although he is stated in the report of the case to have kept them for his own use, it is presumed that the use referred to was the conveyance of passengers for hire—in other words, that the one hundred and twenty-five chariots pertained to a line of stage coaches. If this was the fact the tax was indirect, for the taxpayer could charge it all over to his passengers by making a slight addition to their fare. But although the decision of the case before the court appears, for the reason stated, to have been correct, positions were taken, in the opinions of the Judges delivered on the occasion, which are wholly untenable.

It is assumed, though Judge Chase is careful to disclaim giving a judicial opinion on that point, "that the direct taxes contemplated by the constitution are only two, to wit—a capitation or poll tax and a tax on land, and the principal, if not the only, direct taxes within the meaning of the constitution are only two, to wit—a capitation or poll tax simply, without regard to property, profession, or any other circumstance, and a tax on land."

Judge Patterson first struck the constitution squarely in the face by declaring that "the rule of apportionment * * * is radically wrong; it cannot be supported by any solid reasoning." He then went on to comment on the observation of counsel *"that Congress may select in the different States different articles or objects from which to raise the apportioned sum,"* and he said, *"the idea is novel."* What! shall land be taxed in one State, slaves in another, carriages in a third and horses in a fourth, or shall several of these be thrown together in order to levy and make the quotaed sum? *The scheme is fanciful."*

Judge Iredell said:—"Such an arbitrary method of *taxing different States differently is a suggestion altogether new."*

Point blank against these assertions I oppose the statements of the men who made the constitution and who fully explained its meaning. In the debate on the provision of the constitution relating to direct taxation, in the federal convention, Oliver Ellsworth said:—"The sum allotted to a State may be levied without difficulty, according to the plan used by the State in raising its own supplies." (V. Elliot's Debates, 305.) Mr. Ellsworth was not only a member of the federal convention, but he was one of the Committee of Detail appointed by the convention to draft the constitution. He had been a member of Congress under the confederation, and participated in the important debates in that body on the subject of taxes. In the above lucid explanation of the intention of this clause in the constitution, he was, in fact, only giving an authoritative interpretation of the true meaning of his own well-considered language—his own and that of the other learned men on the Committee of Detail with him. On the morning of the very day upon which this case was decided, Mr. Ellsworth was sworn in as Chief Justice of the Supreme Court of the United States. Had he participated in the proceedings he might have concurred in the decision, but it would have been impossible for him to acquiesce in the *dicta* of the Judges, for they were in direct contradiction to the proceedings of the federal convention, and to his own official exposition of the meaning of this provision of the constitution; but he excused himself from taking any part, on the ground that he had not heard the arguments in the case.

What were the plans used by the different States at that time in raising their own supplies, according to which Mr. Ellsworth said direct taxes, under the constitution, could be imposed? They were very dissimilar in different States. In New York, Rhode Island and Maryland they were imposed on the mass of property, real and personal, with certain exceptions. In some States all the stock of farms was taxed; in others it was not taxed at all; while in others still a part of the stock was taxed, as horses in Virginia; and in some other States horses and cattle. *Delaware the entire tax was upon income.* (Report of Oliver Wolcott, Jr., Secretary of the Treasury, on direct taxes, 1796.) In the Virginia convention which ratified the constitution Governor Randolph said of the direct tax by the general government, "it must be clearly laid on the most productive article in each particular State. * * * Were the tax laid on one uniform article through the Union its operation would be oppressive on a considerable part of the people." (III. Elliot's Debates, 121, 122.) Governor Randolph was on the committee with Mr. Ellsworth in the federal convention appointed to draft the constitution. So we have two members of that committee—the committee who drew up the constitution—making the same explanation of the clause about direct taxes, and that explanation at variance with the interpretation of the Judges in the Hylton case.

The carriage case was decided at a very early day in the history of the Supreme Court, and before that court had acquired the high position in the estimation of the legal profession and of the public which it has since attained. One of the Judges, in delivering his opinion, speaks of it himself as a "discourse;" they all evince great want of knowledge of the subject which they discuss. The crude speeches made from the bench in this case have acquired a degree of consideration which they do not intrinsically merit. They shine in the borrowed light shed back upon them by the great intellect which for so many years illuminated the decisions of that tribunal—the illustrious Marshall—with whose grandeur of fame we naturally associate all ideas of the Supreme Court.

Fortunately, however, we have the opinion of John Marshall on this provision of the constitution. It was expressed very fully in the Virginia Convention called to ratify the constitution, and it accords with that of Mr. Ellsworth and that of Governor Randolph, and is entirely at variance with the views which I have criticised of the Judges in the Hylton case.

In the debate on the provision relating to direct taxes James Monroe had asked:—"What are the objects of direct taxation? * * * Will the taxes be laid on land? * * * A very considerable part of the community would escape. * * * What is the extent of the power of laying and collecting direct taxes? *Does it not give to the United States all the resources of the individual States?"* (3 Elliot's Debates, 215, 216.) Judge Marshall said in answer:—*"Where is the absurdity of having thirteen revenues? Will they clash with, or injure each other? If not, why cannot Congress make thirteen distinct laws, and impose the taxes on the several objects of taxation in each State so as that all persons of the society shall pay equally, as they ought?"* (Ibid, 255.)

In addition to the opinions thus clearly expressed by Ellsworth and Marshall, who held successively the office of Chief Justice of the Supreme Court of the United States, I will cite another name, which must be regarded as second to none as an authority for the true interpretation of the constitution, and that name is James Madison. Of him Daniel Webster said in a speech delivered in this city in 1851:—

> If ever man had the means of understanding a written instrument, Mr. Madison has the means of understanding the constitution. If it be possible to know what was designed by it, he must tell us. Having been afterwards, for eight years, Secretary of State and as long President, Mr. Madison has had an experience in the affairs of the constitution certainly second to no man. More than any other man living and perhaps more than any other who has lived, he whole public life has been incorporated, as it were, into the constitution; in the original conception and project of attempting to form it, in its actual framing, in explaining and recommending it, by speaking and writing, in assisting at the first organization of the government under it, and in a long administration of its executive powers—in these various ways he has lived near the constitution, and with the power of imbibing the true spirit and inhaling its very breath from its first pulsation of life. Again, therefore, I ask, if he cannot tell us what the constitution is and what it means who can? (Works of Daniel Webster, i., 205, 206.)

Mr. Madison followed John Marshall in the debate, and he said:—

> It has been said that ten men deputed from this State, and others in proportion from other States, will not be able to *adjust direct taxes so as to accommodate the various objects in thirteen States.* I confess I do not see the force of this observation. * * * They will be perfectly well informed of the circumstances of the people of the different States, and the mode of taxation that would be most convenient for them, from the laws of the States. *In saying taxes may even refer to the State system of taxation.* * * * My honorable friend over the way (Mr. Monroe) yesterday seemed to conceive, as an insuperable objection, that if lands were made the particular object of taxation it would be unjust in discharging the landholders, and that any extensive selection would be unequal and unfair. *If the general good seemed to require it, I conceive the objection would have some force in it.* But if this be not the case it can have no weight. If it should have a general power of direct taxation they could *select the most proper objects* and distribute the taxes in such a manner as that they should fall in a due degree on every member of the community. They will be limited to the proportion of each State, but they must raise it in the most